IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1676

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION and CONTINENTAL TELEPHONE CORPORATION, *Petitioners*

v.

FEDERAL COMMUNICATIONS COMMISSION and the UNITED STATES OF AMERICA, *et al., Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY OF PETITIONERS

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REPLY OF PETITIONERS

Petitioners respectfully submit this brief reply to the "Brief for the Federal Respondents in Opposition."

The effort of Federal Respondents to portray this case as but an insignificant incident in the implementation of a long-established statutorily and judicially approved Federal policy demonstrates a remarkable ability to disregard or distort both fact and law.

I. THE CASE PRESENTS SUBSTANTIAL FEDERAL QUESTIONS.

At the inception of the proceeding below, a proceeding that for over four years occupied the time of the Federal Communications Commission, State commissions, several dozen non-Government parties, advisory committees and consulting research organizations, involved the expenditure of millions of dollars, and the compilation of a record of tens of thousands of pages, the FCC specified the basic issue as whether there should be "*. . . a basic and substantial change*" in the nature of "interstate and foreign message telephone service (MTS) and wide area telephone service (WATS) which would permit customers to furnish part of those services"[1] (emphasis supplied). Additionally, in a related case, the FCC deferred action on a complaint by a telephone instrument supplier because the relief suggested, *i.e.*, substitution of the supplier's telephones for those furnished by telephone companies, would necessitate "a basic and substantial change" in the nature of "message telephone service."[2]

It is precisely that *basic and substantial change*, not an insignificant incident, that would be ordered by the FCC's telephone equipment registration plan now before the Court. Indeed, the court below recognized, "the special and novel circumstances of this case, which implicates significant state and federal interests . . ." (Pet. App. 12a).

Petitioners have shown that this case has staggering practical ramifications, involving as it does every one

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[1] *Interstate and Foreign MTS and WATS*, 35 FCC 2d 539 (1972).

[2] *Western States Telephone Company* v. *AT&T*, 19 FCC 2d 1068 (1969).

of the over 160,000,000 telephones and other items of terminal equipment in use on this nation's telephone network, each of the nation's over 1,600 telephone companies and each of their millions of customers, each of the 50 state utility regulatory bodies, and hundreds of millions or ultimately billions of dollars in increased telephone rates.[3]

Given the Commission's own view of its proceeding, the long history of the case, the lower court's recognition of the circumstances of this case and the significance of the interests involved, together with petitioners unrebutted showings, for Federal Respondents to now characterize the case as of little if any import is at best a distorted view, if not wholly at odds with reality. The issues are significant and substantial. The impact is severe and widespread. We submit that the case is clearly cert-worthy under basic certiorari criteria.

II. FEDERAL RESPONDENTS HAS MISSTATED COMMISSION PRECEDENT.

With the Commission's decision admittedly and obviously representing "a basic and substantial change" in its so-called "interconnection policy," the implication is clear that Federal Respondents' string citation (p. 18, n.19) of prior FCC decisions, allegedly reflecting long established Commission policy, is faulty. The fault need not be left to implication, however, for review of the cases themselves clearly demonstrates their inapplicability to the case at bar.

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[3] Federal respondents have chosen to ignore this economic impact (as did the FCC), electing instead to focus on first year "compliance cost" (p. 8) of *only* $94 million (for AT&T), an amount termed "minimal" and "relatively inexpensive" (*Ibid.*).

In *Recording Devices,*[4] for example, the FCC conclusion was:

> "Accordingly, State and other local regulatory authorities remain entirely free to deal as they see fit with the use of recording devices on intrastate calls."[5]

In *Jordaphone,*[6] the Commission concluded that interstate tariff restrictions were unlawful—

> ". . . in any community or state in which the use of such answering device with respect to intrastate or exchange telephone service is authorized by appropriate local or state regulatory agencies or commissions."[7]

Federal deference to State regulation in these cases stands in sharp contrast to the massive Federal preemptive effort in the instant case. Moreover, review of the other cited cases shows total lack of support for any claim of 30 years of consistent Federal regulatory practice and policy. *AT&T (TWX),*[8] *Department of Defense* v. *Gen. Tel.,*[9] and *DOD* v. *AT&T,*[10] for example, had nothing whatever to do with Federal interconnection policy. Each case in fact involved Federal regulation of *rates for* what were found to be

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[4] 11 FCC 1033 (1947).

[5] *Id.* at 1047.

[6] 18 FCC 644 (1954).

[7] *Id.* at 671.

[8] 38 FCC 1127 (1965).

[9] 38 FCC 2d 803 (1973).

[10] 38 FCC 2d 819 (1970).

interstate services. Indeed, as the court below acknowledged,

> "It is true that most practices regarding terminal equipment have historically been regulated by the states, and that the FCC has always formulated its decision in terms of equipment used for 'interstate communication.'"[11]

Katz[12] and *Fallon*[13] are equally inapplicable. *Katz* was a case involving tariff regulations prohibiting use of interstate telephone service for unlawful purposes; and *Fallon* was a complaint against a telephone company for delay in installing equipment (the complaint was dismissed). Neither case related in any way to customer provided terminal equipment or interconnection.

In *Railroad Interconnection*,[14] the proceeding was terminated on the filing of tariffs allowing connection of right-of-way companies' communications systems to the interstate telephone network in cases of safety emergencies, or in cases of calls where prompt action was needed for continued railroad operation. The case hardly suggests a policy allowing unlimited interconnection of customer provided terminal

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[11] Pet. App. 20a.

[12] 43 FCC 132[illegible] (1953).

[13] 14 FCC 2d 972 (1968).

[14] 32 FCC 337 (1962). In this case, the Commission expressly declined to find the tariff filing just and reasonable, just as it did several years later in regard to the post-*Carterfone* tariffs (15 FCC 2d 605 (1968)). That tariff filing by AT&T from which Commission approval was specifically withheld can now be said by Respondents to represent expressions of Commission policy is patently absurd.

equipment. The oft-cited and heavily relied on *Hush-A-Phone* [15] case is of interest on two points: 1) it involved only attachment of an inactive cup-like device to the telephone mouthpiece, not customer-provided communications equipment; and 2) the "privately beneficial but not publicly detrimental" use of the telephone (not replacement of it) concept originated with the court in reversing the Commission's decision prohibiting use of the device.[16]

Least persuasive of consistent policy of the cited cases is *Mebane*,[17] for that FCC seriatim decision, first reached on the ground that the Commission did not understand the meaning of the phrase "the telephone system" secondly, on the theory that Mebane's economic injury was speculative, and finally on a finding that loss of customers by Mebane was expected, contains the clearest and most explicit acknowledgement of a complete and major change in FCC interconnection policy that the English language could convey. There the Commission acknowledged that its *Carterfone* decision and its *Carterfone* policy involved attachments to, not customer replacement of or substitution for telephone company equipment. Thus, in the Commission's words,

> "As we see it, however, the basic question raised by AT&T's tariff filing on behalf of Mebane is not only whether such filing is consistent with *Carterfone* as described above, but also whether any public interest reasons *now* exist for the applicability of our customer interconnection policy

[15] 22 FCC 112 (1957).

[16] 238 F.2d 266 (D.C. Cir. 1956).

[17] 53 FCC 2d 473 (1975).

> to depend on a distinction between interconnection devices which may constitute a substitution for telephone system equipment . . . and other interconnected devices such as the *Carterfone* device."[18]

Citing *Hush-A-Phone*, the Commission concluded:

> "We see no reason why this broad principle should not extend to interconnected devices such as PBX's (sic) and key systems which may replace telephone system equipment."[19]

Thus, because the Commission saw "no reason why not," its interconnection policy was changed in 1975 from permitting the Hush-A-Phone cup and the Carterfone attachment to allowing a wholesale replacement of telephone company equipment.[20]

Thus it is clear from the Commission's own words, in contradiction of those of its advocates, that its 1975 actions in *Mebane* and in *Interstate and Foreign MTS and WATS* (the case below) represented a drastic, far reaching change in policy, not a continuation of 30 years of consistent administrative policy as now suggested to this Court.

III. FEDERAL RESPONDENTS HAVE MISCONSTRUED JUDICIAL PRECEDENT AND LEGISLATIVE HISTORY.

Just as Federal Respondents have misstated both the significance of the issues in this case and the Com-

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[18] 53 FCC 2d at 476.

[19] *Id.* at 477.

[20] Clearly this was not FCC policy in 1973 when then Chairman Burch advised Congress that the Commission "lack[s] primary jurisdiction over telephone sets . . . " (119 Cong. Rec. 30962).

mission's own precedents and policies, so too have they misconstrued judicial precedent and the legislative history of the Communications Act of 1934.

Being wholly unable to cope with the statutory language used by the Congress, *i.e.*,

> "*Nothing* in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) . . . facilities or regulations for or in connection with intrastate communication service by wire or radio of any carrier" [21] (emphasis supplied).

Federal Respondents take refuge in a statute of their own enactment. What Congress intended to say, the argument goes, was that there would be no Federal jurisdiction over facilities *solely, exclusively,* or *purely* used in intrastate communication service.[22]

That there is no support in the legislative history of the Communications Act for this amendment by advocacy is obvious from the failure of Federal Respondents to support the argument by even a single citation. Moreover, this unsupported, 43 years after the fact, argument simply flies in the face of expressed Congressional language and intent; and in addition, imputes to the 1934 Congress a complete lack of knowledge of the facts of telephone system operation, an imputation clearly and completely refuted by the Act's legislative

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[21] Communications Act of 1934, Sec. 2(b)(1); Pet. App. 1h-2h.

[22] Respondents' Brief, pp. 3, 21. Having thus amended the statute to their own liking, Federal Respondents suggestion that the burden is now on petitioners to persuade the Congress to legislate a change in FCC policy (p. 13) approaches the height of bureaucratic disdain.

history. As best and most succintly put by the Commission itself,

> "When the Communications Act was enacted in 1934, Congress was concerned that the telephone might be considered an instrumentality of interstate communication merely because of the circumstances that every telephone can be connected with a toll line for interstate calls. . . . Congress agreed with the USITA position that 'the tail should not wag the dog;' that their [independent telephone company] telephone facilities should remain under State regulation because they were essentially local. . . ."[23]

To say now, as do Federal Respondents, that the telephone is an instrumentality of interstate communication and therefore subject to Federal preemptive jurisdiction because the telephone is not used exclusively in intrastate communication is a flat contradiction of Congressional intent and an aspersion on Congressional intelligence. The Congress in 1934 well knew the facts of telephone life, and with that knowledge enacted a statute that plainly says *nothing* shall confer Federal jurisdiction over facilities used for or in connection with intrastate and exchange communication.

Congressman Rayburn clearly understood the meaning of the word "nothing." The Communications Act of 1934, in his words, does "not apply to a telephone receiving set, or anything else like that."[24]

In 1973, then FCC Chairman Burch also clearly understood what "nothing" meant. In his words, the Commission "lack[s] primary jurisdiction over tele-

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[23] *General Telephone of California,* 14 FCC 2d 693, 696 (1968).

[24] House Hearings, H.R. 8301, 73d Cong., 2d Sess. 179 (1934).

phone sets which are a primary part of the facilities used in providing exchange telephone service."[25]

And this Court experienced no difficulty in summarily disposing of a similar Federal contention in these words:

> "It is hard for us to believe that Congress meant us to read 'shall have jurisdiction' where it had carefully written 'but shall not have jurisdiction.' The command 'thou shalt not' is usually rendered as to forbid and we think here it was employed without subtlety and in the usual sense."[26]

Federal Respondents difficulty in translating "shall not" to read "shall" appears to be responsible for yet another diversionary effort, *i.e.,* the contention that Federal jurisdiction over local telephone facilities must exist because the Congress conferred on the FCC limited regulatory authority over "connecting carriers" participation in interstate communication.[27] This contention is wide of the mark, however, for the statutory language conferring this limited jurisdiction quite clearly limits it to the interstate service of otherwise wholly exempt carriers; the proviso in no way purports to qualify the exclusion from Federal jurisdiction of intrastate *facilities of all carriers* contained in Section 2(b)(1) of the Act.[28]

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[25] 119 Cong. Rec. 30962.

[26] *Connecticut Light & Power Co.* v. *FPC,* 324 U.S. 515, 528-529 (1945).

[27] Respondents' Brief, p. 14. These are the so-called Section 2 (b)(2) companies, who engage in interstate communication solely through interconnection with another, unaffiliated company.

[28] Pet. App. 1h-2h.

In advancing this contention, moreover, Federal Respondents choose to ignore the inapplicability of Section 214 of the Act (47 U.S.C. 214),[29] the only statutory provision under which any facility authorization from FCC is required, to the connecting carriers. Connecting carriers may construct or operate any facility, other than an exclusively interstate line, without FCC involvement. Thus the connecting carrier argument, rather than being supportive of Federal Respondents' innovative approach to statutory construction, substantially undercuts it.

In sum, as petitioners in this case have shown, the Congress in 1934 was aware of the integrated operation of the telephone network. It sought to protect and preserve then existing State jurisdiction over local facilities and services by enacting Section 2(b)(1). In Section 221(b) it sought to exclude from Federal jurisdiction, *even interstate facilities and services,* where by geographical happenstance those facilities and services extended across state boundaries but performed local exchange functions.[30] Twenty years later, another Congress amended both Sections 2(b) and 221(b) to insure that use of radio facilities by telephone companies would not subject intrastate and local facilities and operations to Federal jurisdiction.[31]

Indeed, the entire Congressional history could not have more clearly established the Federal legislative purpose of creating, for the first time, effective Federal

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[29] Pet. App. 10h-12h.

[30] Contrary to Federal Respondents "surplusage" argument, Section 221(b) is necessary (in addition to Section 2(b)(1)) to protect State jurisdiction over, *inter alia,* exchange rates that are interstate in nature and hence not protected by Section 2(b)(1).

[31] 68 Stat. 63, 64.

regulation of interstate and foreign communication, while at the same time preserving intact and untouched the State regulatory authority over intrastate and local matters that in 1934 had been in existence for some 30 years. Congress sought neither displacement of State regulatory authority, nor a Federal-State conflict or overlap. It sought, and its statute clearly achieved, to simply fill a regulatory gap—regulation of interstate and foreign communications.

Federal Respondents' description of the state of the law in the courts follows the pattern of treatment accorded facts, issues, Commission precedent, and statutory construction. The recurring and expanding jurisdictional dispute is ignored, as is the substantial disagreement within the courts that have considered the issue.[32]

California v. *FCC*,[33] for example, in Federal Respondents' view, marks the first time the District of Columbia Circuit "thoroughly considered" the jurisdictional issue. The jurisdictional issue was indeed thoroughly considered in *California*, but in the dissenting opinion of Circuit Judge Robinson, not in the court's brief *per curiam* majority opinion.

Similarly, Federal Respondents would dismiss *Kitchen*,[34] a case in which the D.C. Circuit did indeed

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[32] Respondents tend to ignore the uncertainty expressed by the First Circuit, as well as the in-depth dissents in the Fourth and D.C. Circuit cases.

[33] C.A. D.C. Cir. No. 75-2060, June 20, 1977.

[34] 464 F.2d 801 (D.C. Cir. 1972). Federal Respondents "dictum" label is based on what FCC argued in the case, not what the court decided. The court's opinion specifically assumed *arguendo* that Section 214 applied and held that "jurisdiction would still be precluded by Section 221(b)." *Id.* at 803.

thoroughly consider the jurisdictional issue, by the self-serving characterization of that portion of the court's opinion with which Federal Respondents disagree as "*dictum*" (p. 13, n.12); and by asserting, contrary to fact, that the facility involved (a telephone central office) had no effect on interstate communications. As the case itself shows, the *Kitchen* facility, like the telephone instrument, would handle interstate as well as local exchange calls. And again, Federal Respondents' attempt to distinguish *NARUC*,[35] another thoroughly considered D.C. Circuit jurisdictional case, on an asserted absence of interstate nexus, ignores the fact that the cable TV operations there involved utilized the same coaxial cable facility to transmit television programs, undeniably interstate in character.

In acclaiming *Puerto Rico*[36] as a case in point, Federal Respondents overlook two things. First, the *Puerto Rico* court specifically acknowledged that Sections 2(b)(1) and 221(b), "[r]ead literally, do appear to preclude"[37] Federal jurisdiction. The court's resolution of the jurisdictional issue, according to the court was "far from free of doubt."[38] Second, in reaching its uncertain decision on the jurisdictional issue itself, the *Puerto Rico* court carefully pointed out the factors which the Commission must consider in exercising its regulatory jurisdiction. In the court's words,

> "The FCC must determine whether a PRTC monopoly in this case will enhance the development of intrastate and interstate telephone service.

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[35] 533 F.2d 601 (D.C. Cir. 1976).

[36] 553 F.2d 694 (1st Cir. 1977).

[37] *Id.* at 698.

[38] *Id.* at 699.

> Against that finding must be balanced the asserted countervailing interest of telephone subscribers 'reasonably to use . . . telephone[s] in ways which are privately beneficial without being publicly detrimental.'"[39]

Throughout the instant proceeding before the Commission, before the court below, and before this Court, petitioners have consistently and repeatedly pointed out the total failure, indeed the outright and repeated refusal by the FCC, to perform the balancing of interests mandated by the *Puerto Rico* court.

IV. THE BALANCING OF INTERESTS REQUIRES CONSIDERATION OF ECONOMIC IMPACT.

In seeking certiorari in this case, petitioners have emphasized that involved is not only the fundamental question of Federal jurisdiction itself, but also the grievous flaw in the Commission's exercise of that claimed Federal jurisdiction by prescribing a nationwide terminal equipment registration program without considering the economic impact of its action on telephone company ratepayers.[40]

Whether the FCC correctly opined that AT&T's $94 million first year "compliance cost" is "minimal" may be subject to debate. The crucial fact, however, is not telephone company compliance cost, but the economic impact on millions of telephone company ratepayers through a widespread shift to customer-

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[39] *Id.* at 701.

[40] Paradoxically, although the Commission promulgated its equipment registration program without consideration of its economic impact, it appears to have requested additional economic data from Puerto Rico Telephone Company prior to taking final action on a request for waiver of that program. *Ibid.*

provided telephone terminal equipment, a shift that would obviously be encouraged and facilitated by the FCC registration plan. The truth of the matter is that never in its history to date has the FCC conducted a study of the economic impact of its terminal equipment interconnection policies, and the Commission itself has repeatedly so stated.

In *Carterfone,* a case which involved only an attachment to the telephone network, not customer replacement of critical elements of that nework, the Commission acknowledged that it had no occasion to address the economic impact issue. It did recognize, however, that "economic effects upon the carriers rate structure might well be a public interest question," one to be weigh[ed] against the benefits of interconnection.[41] Again, the issue of the economic impact of the registration program proposed by FCC in this proceeding was, according to then Chairman Burch, "integral to a fair resolution" of the proceeding.[42]

Despite this continuing judicial and administrative understanding of the need for balancing the several public interest factors involved in these FCC proceedings, what did the FCC actually do?

In the case at bar, the Commission proclaims that "The present decision related *only* to the requirements which interconnected devices must satisfy in order to avoid technical harm to the telephone network." [43] The FCC emphasized that "From its inception, Docket No.

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[41] 14 FCC 2d at 573.

[42] App. 9a-10a.

[43] Pet. App. 14b.

19528 has been concerned solely with the issue of technical harm." [44]

The first fact is, then, that the Commission has never determined the economic impact of its interconnection policy, either as enunciated in *Carterfone* (attachments) or as significantly revised and expanded here (replacements). The second fact is that recently the FCC has announced its recognition of the fact that a significant shift to customer-provided terminal equipment "could work to the detriment of the independent telephone industry," [45] and has instituted a proceeding to determine what action might be taken "to ameliorate or avoid any adverse revenue consequences. . . ." [46]

Thus the Commission's own orders in the instant case, together with its subsequent actions, sharply contradict its advocates' theory on brief that the Commission has given proper and adequate consideration to the economic effects of the Commission's actions in the case at bar. In short, FCC admittedly gave no consideration to economic impact in *Carterfone* and refused to do so in the case at bar; but belatedly, and to this moment ineffectually, has now determined that its earlier promised consideration of economic impact should be initiated. Thus even were Federal Respondents correct in contending that petitioners "economic

[44] Pet. App. 7c. This preoccupation with "technical harm" was so incredibly intense that the Commission disclaimed any responsibility for whether FCC certified equipment would work. That, according to FCC, is a risk assumed by the customer! (Pet. App. 11c).

[45] *Customer Interconnection*, 61 FCC 2d 766 (1976).

[46] *Customer Provision of Terminal Equipment*, FCC 76-1008, November 8, 1976.

concerns flow from the *Carterfone* interconnection policy" (Brief, p. 7), the fact remains that the Commission's "basic obligation to consider fully all evidence bearing on the public interest in advance of taking regulatory action" has not been fulfilled; and "disinclination by the FCC . . . to 'revisit *Carterfone*' simply misses the point."[47] And Federal Respondents' assurances that the Commission plans to take an after-the-fact look at the consequences of its already taken action neither comports with legal requirement nor offers any degree of practical consolation.

In the face of in-depth studies projecting multi-billion dollar telephone rate increases from widespread substitution of customer-provided telephone equipment, the FCC is legally and rationally obliged to give consideration to the economic impact of its program *before* it implements it. This is what FCC failed to do and its failure is admitted by its own decision.

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[47] Pet. App. 40a-41a.

CONCLUSION

Certiorari in this case is clearly warranted, and indeed is required to resolve the substantial and controversial issues here presented. Federal Respondents' "Brief in Opposition" has totally missed or misstated the points at issue. For the reasons given here and in the petitions, certiorari should be granted.

Respectfully submitted,

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